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An Introduction to Ontario's *Waste Diversion Act*

A background paper on the review of the *Waste Diversion Act*

November 2008

Canadian Institute for Environmental Law and Policy

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This background paper is intended to provide readers with a better understanding of Ontario's *Waste Diversion Act*, including how it establishes a process for the development of waste diversion programs, the roles of various players in the process, and criticisms that stakeholders have expressed about the Act and how it has been implemented. The concerns presented below have been collected from internet sources and personal interviews with a wide range of stakeholders conducted by CIELAP. These concerns do not represent an exhaustive list or represent every stakeholder perspective, nor do they necessarily represent CIELAP's views.

Additional background materials can be downloaded from www.cielap.org.

The Waste Diversion Act

On June 27, 2002 the Ontario government passed the *Waste Diversion Act, 2002 (WDA)*, stating that its purposes were to encourage the reduction, reuse and recycling of wastes, and facilitate the development, implementation and operation of waste diversion programs.

Enactment of the WDA

The *WDA* became law after three decades of heated provincial debate over waste issues and at a time when the province's prized waste management tool – the blue box – was at risk of being abandoned in many municipalities due to a lack of funding. The government established the Act with the unstated but commonly-understood intentions of removing itself from the political spotlight – by shifting responsibility to an arms-length agency – and securing long-term industry funding for the diversion of blue box materials and future waste streams.

Some Initial Criticisms Expressed by Stakeholders about the WDA

- The government used the *WDA* to distance itself from the controversial issue of waste diversion, an issue that needs government leadership, by shifting responsibility to an arms-length and industry-dominated board that would have little interest in developing strong stewardship programs.
- The *WDA* restricts the rights of the public to hold the government accountable because it protects the government from public lawsuits for actions taken by the arms-length organization.
- The *WDA* was simply established as a funding program for the blue box and did not create an effective regulatory foundation for waste diversion in the province.

Some Continuing Criticisms Expressed by Stakeholders about the WDA

- During its first six years very few waste diversion programs were successfully put in place under the *WDA*
- Stewards have prioritized minimizing costs to businesses over achieving increased waste diversion
- The true purposes of the Act remain unclear – is it meant to be a mechanism to fund

recycling programs, to achieve extended producer responsibility, or to realize some other purpose?

One of the final sections of the *WDA* requires the Minister to enact a review of the Act within five years after coming into force. The Ministry of the Environment (MOE) initiated the review in October 2008 with the release of the discussion paper *Toward a Zero Waste Future*.

Waste Diversion Ontario

The *WDA* established Waste Diversion Ontario (WDO), a non-crown agency, as the primary mechanism for achieving the Act's purposes. The Act gives WDO the responsibility of developing, implementing, and operating waste diversion programs for waste materials designated by the Minister of the Environment, and of monitoring the effectiveness of these programs. The *WDA* further sets out how WDO is to meet its responsibilities.

WDO is overseen by a Board of Directors, the composition of which is specified in the Act. Until recent changes the WDO was dominated by industry representatives with some municipal seats. This governance structure was heavily criticized because of embedded conflict of interest: industries that developed waste diversion programs were in a position, as the majority of the WDO board, to approve and monitor these same programs. External stakeholders called for a restructuring of the board to make it more independent, and reduce both the influence of industry representatives and the allegiance of these representatives to their nominating organizations. In April 2008 the Minister of the Environment amended the Operating Agreement between the Minister and WDO to modify the WDO board's governance structure in the interest of creating a better balance of representatives who could effectively oversee the WDO without strong conflicts of interest and allegiance. The new structure, which is currently being implemented, has 16 seats: five industry representatives, four municipal representatives, one ENGO representative, one senior staff person from MOE, and five directors who are to be appointed by the Minister of the Environment and cannot be industry representatives affected by WDO programs, municipal representatives or Ontario government employees. It is hoped that the new governance structure will improve the governance role of the WDO.

Process for Developing Waste Diversion Programs

Designation of Waste

The *WDA* empowers the Minister to designate waste materials, through the development of a regulation, for which a diversion program is to be established. Each draft regulation must be posted on the Environmental Registry for at least 30 days for public review and comment.

Program Request Letter

The Minister writes a Program Request Letter (PRL) asking WDO to develop a waste diversion program for the designated waste material. As of August 2008 the Minister has asked WDO to develop waste diversion programs for Blue Box Wastes, Used Tires, Used Oil Material, Waste Electrical and Electronic Equipment (WEEE), and Municipal Hazardous or Special Waste (MHSW) under the *WDA*. The WEEE and MHSW programs have been developed in multiple Phases, with different materials targeted in each Phase.

The PRL provides details on how a program is to be developed and typically includes:

- specific categories of materials that should be made a priority for the program;
- deliverables and timelines for consultations and program development;
- priorities and considerations for the program, such as the development of incentives encouraging stewards to improve product design to reduce waste, increase the recyclability of their products and increase the use of recycled content in their products;
- how the fee structure is to look and what activities are to be funded by stewards (e.g. collection, processing); and
- who the stewards (funders) are for the program and how the stewards should organize themselves, through the development of an Industry Funding Organization.

Additional PRLs may be provided to build on or modify previous program requests. For example, in 2008 the Minister delivered a PRL that made funding for the second and third phases of the MHSW program the full responsibility of stewards, rather than their partial responsibility as had been the case in the first phase.

Some Criticisms Expressed by Stakeholders about the Designation and Program Request Letter Processes

- The process for developing the PRL, including what categories are considered priority materials, is held behind closed doors and is susceptible to lobbying efforts.
- There has been no process for stakeholder consultation before the Minister decides what materials should be diverted.
- The PRLs have at times been too prescriptive and detailed and thus limited the development of creative waste diversion options.
- Ambitious targets are not established by the Minister's leadership but are rather left to the industry groups to establish, meaning that ambitious targets may not be set.

Industry Funding Organizations

For each designated waste material, "stewards" – companies and organizations that have a commercial link to the designated waste or to a product from which the designated waste is derived – are required to self-organize and set up an Industry Funding Organization (IFO). The IFO becomes responsible for: reporting to the WDO; developing and operating a waste diversion program that meets the requirements of the Minister's PRL and the WDA; and funding it with fees charged from the stewards. Programs generally consist of:

- a plan for how the program is to be funded;
- activities to reduce, reuse and recycle the designated waste;
- research and development related to the management of the designated waste;
- activities to promote the production of products that result from the program; and
- educational and public awareness activities.

A company may opt out and develop its own industry stewardship plan that must meet or exceed the Minister's requirements independent of the IFO program, but only after a collective industry stewardship plan has been developed. In such a case, the plan must be accepted by the WDO and by the Minister, and the company must submit an annual report to the WDO. The WDO is responsible for monitoring the effectiveness of each industry stewardship plan. While the steward is not required to pay stewardship fees in this case, the WDO may charge a fee to cover the expenses associated with administering the plan.

Some Criticisms Expressed by Stakeholders relating to Industry Funding Organizations

- If a company desires to develop its own waste diversion program to meet the Minister's requirements independent of the IFO program, the company can only opt out and develop an industry stewardship plan after it has gone through the effort to collaborate with the IFO to develop a collective program.
- Any stewardship or design efforts made by individual stewards prior to program development are not supported, in essence negating these efforts for fee setting and other purposes.
- The process is based on collective stewardship, making everyone equally responsible for program costs, rather than individual stewardship, which would make each steward responsible for their own material costs and so give incentive for the design of waste materials that are easier and less costly to divert from waste.
- There is no process in place for stewards to self-organize, making the development of the IFO a challenging process.

Program Development and Stakeholder Consultation

The Minister's PRL specifies a process and timeline for program development and requires that the IFO develop a program plan. The IFO and WDO are required to consult with stakeholders as a part of this process. They may target audiences such as stewards, industry and trade associations, affected industries, municipalities and the general public. Past consultation processes have included: providing information on the WDO and IFO websites; holding meetings with key stakeholders; producing consultation papers that seek public input; holding consultation meetings that were also broadcasted through online webcasts; and posting the program plan for public comment.

Some Criticisms Expressed by Stakeholders about Program Development and Stakeholder Consultation

- Extremely tight deadlines make it difficult to weigh and consider various options and perspectives, develop a strong program plan, and conduct effective consultation.
- There is a lack of support to enable the general public and stakeholders who have limited resources to participate.
- Consultations have not been genuine and that IFOs have seemed to have already pre-determined their program plans.

Program Approval

Prior to delivering the program plan to the Minister for approval, the IFO must gain program approval from the WDO Board. Once the WDO has approved the proposed plan and the plan is sent to the Minister, the Minister only has two options, either to accept or reject the program. There is no option to ask the IFO to modify a component in order to make the plan more acceptable. The program is posted on the EBR for a minimum of 30 days for public comment and review during the decision period.

Some Criticisms Expressed by Stakeholders about Program Approval

- There is a conflict of interest in that WDO's program development costs are funded by the IFO. The WDO can only recover its costs when a program plan is approved. This is a challenge for WDO's independence and its sustainability.
- WDO does not have enough resources to ensure that the program meets all the requirements of the PRL.
- There is not enough time or capacity for stakeholders to review and comment on the program plans because the plans are long, complex and detailed and no one has ever prepared any user-friendly briefs for consideration.
- The Minister may take a significant amount of time to approve the program plan after the IFO has conducted the process very quickly to meet tight deadlines.
- The Minister cannot ask for the plan to be modified but must either accept it as presented, or reject the plan in which case the process would have to start over again, when much money has already been spent for program development.

Monitoring and Evaluation

According to the WDA, WDO is responsible for monitoring the effectiveness of waste diversion programs. This organization, however, has very few staff and resources, and has not been able to perform much in the way of evaluation to date. The WDO also lacks any authority to hold the IFOs accountable and to enforce programs. In addition no metrics have been set for evaluation purposes. Stakeholders also suggest that the WDO is conflicted with its dual mandate to develop and then monitor programs.

CIELAP would like to thank the EJLB Foundation, The Law Foundation of Ontario and the McLean Foundation for their support of our *Waste Diversion Act* review project. The Law Foundation of Ontario provided support for the background research component of this project.